86-847

Supreme Court, U.S.
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

F. WALTER CONRAD, JR., *Counsel of Record*
THOMAS H. ADOLPH
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

JOHN T. SIMMONS, JR.
PRUDENTIAL INSURANCE COMPANY
1400 InterFirst Plaza
Houston, Texas 77002
(713) 650-6500

Attorneys for Petitioner
THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA

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QUESTIONS PRESENTED

1. When the Government of the United States of America (the "Government"), acting as a tenant, refuses to vacate leased space, is the Government liable only for a reasonable rent, or is the Government liable for the same damages as any other tenant, *i.e.*, whatever damages were foreseeable at the time of the holdover?

2. May summary judgment be based upon foreseeability of damages where the parties agreed to postpone discovery as to foreseeability and other damages issues and where there was no summary judgment evidence as to what damages would or would not have been foreseeable?

LIST OF PARTIES

The only parties to this action are listed in the caption. Prudential has no parent company or affiliates, and Prudential's only subsidiary which is not wholly owned is 745 Property Investments, a Massachusetts Real Estate Investment trust.

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No.

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THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

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v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Prudential Insurance Company of America ("Prudential") petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit which was entered on August 29, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit has not yet been reported. (App. A, *infra*, A-1 to A-15.) The opinion of the United States Claims Court is reported at 7 Cl. Ct. 710. (App. B, *infra*, B-1 to B-18.)

JURISDICTION

The court of appeals entered judgment on August 29, 1986 (App. C, *infra*, C-1.), and denied a petition for rehearing on September 26, 1986. (App. D, *infra*, D-1.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent portion of the Tucker Act provides:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). Rule 56(c) of the Rules of the United States Claims Court, which relates to summary judgments, provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

This provision is exactly identical to the corresponding part of Rule 56(c) of the Federal Rules of Civil Procedure.

STATEMENT

Prudential, a former landlord to the Government of the United States of America (the "Government"), seeks to recover damages which occurred when for eight (8) months the Government wrongfully refused to vacate space formerly leased from Prudential, despite repeated requests that the Government vacate and repeated notice of Prudential's need for the space. The lease was executed in December 1973, renewed in January 1979, and terminated effective July 1979. The Government held over in the

leased space from July 1979 through April 1980. During the term of the holdover, Prudential notified the Government of its negotiations with a substitute tenant, of its need for the space, and of the risk that Prudential would suffer substantial damages if the Government did not vacate as requested. As a result of the holdover, Prudential lost a tenant that had signed a lease for the space occupied by the Government and for substantial additional space. The new tenant vacated all of its space rented from Prudential and terminated its lease.

Prudential began this action in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491, seeking to recover all of its damages caused by the Government. Upon a motion by the Government, the Claims Court granted partial summary judgment as to Prudential's claim for special damages. The Claims Court based the summary judgment primarily upon its holding that the Government had no obligation to vacate when the lease terminated. As an alternative basis, the Claims Court found that Prudential's damages were not foreseeable when the lease was executed in 1973. Following the partial summary judgment, the parties settled Prudential's remaining claims. Prudential then appealed as to its claim for special damages. The United States Court of Appeals for the Federal Circuit affirmed the summary judgment solely upon the ground that Prudential's damages were not foreseeable when the lease was executed in 1973, and Prudential seeks review of that judgment.

REASONS FOR GRANTING THE PETITION

1. Summary judgment was improper because the Government should be liable for the same damages as any other tenant in the event that the Government refuses to vacate leased premises.

This case raises the important general issue of whether the Government, as a tenant, is a special, protected type of tenant different from private tenants. Specifically, the issue presented is whether, when a landlord to the Government incurs damages because of a holdover by the Government, the landlord may

recover for all those damages which were foreseeable at the time of the Government's holdover. The lower courts have held, in effect, that the Government is liable only for the rental value of the property which it occupies. Thus, the Government is at virtually no risk for its breach of the obligation to vacate upon termination of a lease. The Government has no disincentive to insure that it will not breach its obligation to vacate.

The effect of the decisions by the lower courts in this case is to deny Prudential recovery of substantial damages which were clearly and quite expectedly caused by the Government's improper holdover. The injustice of this rule is clearly illustrated by the facts. The Government held over in leased space for eight (8) months. During that time, the Government's landlord, Prudential, entered into a lease with a new tenant for the space occupied by the Government and for additional space. This new tenant agreed to lease the Government's space and substantial additional space for a term of five (5) years. The loss of this tenant caused extensive damage to Prudential. Prudential's total damages were in excess of $800,000.00, but the lower court awarded Prudential only $136,000.00.

Unless reversed, the rule announced by the lower courts will have far-reaching ill effects. Pursuant to the Tucker Act, the Claims Court has exclusive jurisdiction of Government contract actions, including Government leases, and the Government is perhaps the largest single tenant in the United States. According to the Government-Wide Policy Office in Washington, D.C., during fiscal year 1985, the Government leased 200,882,167 square feet of floor space at a cost of $1,167,458,383. Because of the near impossibility of evicting the Government in the event of a holdover, the inability to recover full damages according to the rule announced by the lower courts in this case will make the Government a most undesirable tenant. When the time for expiration of a Government lease is approaching, the Government's landlord would be unable to prepare to re-lease the space because the landlord would be unable to evict the Government and unable to recover damages if, as in this case, the landlord's

new tenant is forced to find another space in the event the Government refuses to vacate.

By contrast with the rule announced by the courts below, it is clear that a landlord to a private tenant can recover the damages that Prudential seeks in this action.[1] In fact, in a case in which the Government as landlord sued a holdover tenant for failure to vacate, the court stated:

> Moreover, if "the tenant fails to relinquish possession at the end of the term, or his subtenant fails to do so, he is liable to the landlord in damages for the resulting injury to the latter. Thus it has been held that the landlord *may recover for the loss of an opportunity to let to another*, and likewise the expense of a suit to recover possession . . . ."

United States v. Morgan, 196 F. Supp. 345 (D. Md. 1961), affirmed 298 F.2d 255 (4th Cir. 1962) (Quoting Tiffany, *Landlord and Tenant*, § 212, p. 1495) (Emphasis added).

The rule announced by the lower courts herein differs unjustly and unsupportably from the rule where there is a private tenant. According to the courts below, a landlord to the Government may

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[1] *Syracuse Associates v. Touchette Corp.*, 73 App. Div. 2d 813, 424 N.Y. Supp. 2d 72 (1979); *Garrott v. Kendal*, 212 Ark. 210, 205 S.W.2d 192 (1947) (Where new tenant recovered damages against landlord, landlord could recover same damages against old tenant.); *Anderson v. Kokomo Rubber Co.*, 161 Ga. 843, 132 S.E. 76 (1926); *Pleasure Driveway & Park Dist. v. Jones*, 51 Ill. App. 3d 182, 9 Ill. Dec. 677, 367 N.E.2d 111 (1977) (Tenant held liable to landlord for lost profits and out-of-pocket expenses.); *Adams v. Helburn*, 198 Ky. 546, 249 S.W. 543 (1923) (Tenant caused landlord to lose purchaser.); *Bennett v. Weinberger*, 160 La. 1001, 107 So. 780 (1926); *McCullagh v. Goodyear Tire & Rubber Co.*, 342 Mich. 244, 69 N.W.2d 731 (1955) (Landlord can recover for lost profits caused by tenant's holding over.); *Pasieczny v. Bonkowski*, 260 Mich. 107, 244 N.W. 248 (1932); *Hitchcock v. Pratt*, 51 Mich. 263, 16 N.W. 639 (1883) (New owner of property allowed to recover lost profits against holdover tenant.); *Marbridge Building Co. v. White*, 115 Misc. Rep. 320, 188 N.Y. Supp. 233 (1921) (Action for breach of implied covenant to vacate.); *Taylor v. Kaufhold*, 368 Pa. 538, 84 A.2d 347 (1951); *Shannon v. Loeb*, 65 Wash. 640, 118 P.823 (1911) (Tenant caused landlord to lose five-year lease. Landlord awarded damages for the time during which the leased premises remained vacant.).

recover only those damages which were foreseeable when the lease was first executed. The lower courts apparently adopted this rule because of the Tucker Act limitation to actions based upon express or implied contracts. However, none of the damages that Prudential seeks are expressly prohibited by the Tucker Act or any other statute, and the rule adopted by the lower courts is not expressly required by the Tucker Act. In fact, the rule of the lower courts is in direct conflict with the rules relating to allowable damages because of a holdover as followed by state courts and as announced by the RESTATEMENT (SECOND) OF PROPERTY. *See e.g., Frazier v. Wynn*, 459 S.W.2d 895 (Tex. Civ. App.—Amarillo 1970), reversed on other grounds, 472 S.W.2d 750 (Tex. 1971); *Stafford v. Powell*, 148 S.W.2d 965 (Tex. Civ. App.—Eastland 1941, no writ); RESTATEMENT (SECOND) OF PROPERTY, § 14.6 (1977). *See also*, n.1, *infra; Specialty Assembling & Packing Co. v. United States*, 174 Ct. Cl. 153, 355 F.2d 554 (1966) (In *dicta* the court of claims indicated that the Government would be liable for damages foreseeable at the time of a breach of contract.).

According to the rule of the Restatement, where there is a breach of the obligation to vacate, a landlord is entitled to recover:

> for the special damages caused by the holdover which the tenant could reasonably have foreseen at the time of his holding over would result from his conduct, and which the injured party could not reasonably have avoided, unless equitable considerations justify relieving the tenant of some or all of these damages.

RESTATEMENT (SECOND) OF PROPERTY, § 14.6 (1977). The rule of the Restatement implicitly recognizes that all landlords and tenants understand and agree that the tenant will be liable for whatever damages are foreseeable at the time of the holdover. This is understood at the time the parties sign the lease, and it is implied in all leases. Every tenant understands that it will be responsible for whatever damages might be foreseeable at the time that it holds over. The Government should be no exception.

Alternatively, and at the very least, foreseeability of damages in this action should be determined no earlier than the date when the Government renewed the lease in January 1979, just a few months before Prudential terminated the lease. The renewal of a lease, as opposed to an extension of a lease, creates a new lease. *Sanders v. Wender*, 205 Ky. 422, 265 S.W. 939 (1924); *2 Friedman on Leases*, pp. 733-740, § 14.301 (2nd ed. 1983). When the Government exercised its right of renewal, the damages which Prudential seeks to recover were clearly foreseeable. By that time, the Government itself had considered expanding within Prudential's office building, and the Government had been notified by Prudential's agent of the tremendous demand for office space. There is no sound justification upon which a party should be charged only with liability for damages foreseeable at the time a lease is originally executed, and not with damages foreseeable at the time the lease is renewed.

2. Summary judgment on the issue of foreseeability was improper because the parties agreed not to conduct discovery on foreseeability and because there was no summary judgment evidence as to what was or was not foreseeable.

A. The Judgment Is In Conflict With Decisions Of Other Circuits.

The effect of the lower court judgments has been to effectively deny Prudential its access to the courts. Prudential and the Government agreed to bifurcate discovery. The Government indicated that it intended to file a motion for summary judgment as to liability issues. Therefore, the parties agreed to conduct discovery as to liability issues and to postpone discovery of issues relating to damages until after resolution of the motion for summary judgment. In fact, during a deposition, the Government attorney objected to any questions relating to foreseeability. Despite this agreement, the only remaining basis for the summary judgment against Prudential is the issue of foreseeability of damages. The agreement between the parties was intended to further the efficient use of judicial time, but it has instead been used as a tool for injustice.

The injustice of this holding is compounded by the fact that Prudential was not the original landlord to the lease. Therefore, if foreseeability of damages is to be determined as of the time of the original execution of the lease, Prudential's only access to such evidence is through the discovery process. Prudential was denied any opportunity to discover evidence which would support its opposition to the motion for summary judgment.

The ruling of the lower courts is in direct conflict with cases from other circuit courts which have held that where a respondent to a motion for summary judgment has been precluded from obtaining discovery necessary to respond to a motion for summary judgment, summary judgment is inappropriate and improper. *Murray v. City of Chicago*, 634 F.2d 365, 366 (7th Cir. 1980) cert. granted, *Finley v. Murray*, 454 U.S. 962 (1981), cert. dismissed, 456 U.S. 604 (1982); *Cedillo v. International Association of Bridge & Structural Iron Workers*, 603 F.2d 7, 12 (7th Cir. 1979); *National Life Insurance Co. v. Solomon*, 529 F.2d 59, 60 (2nd Cir. 1975).

It is certainly desirable for the efficient use of judicial time and attorney time that parties to litigation agree to bifurcate discovery or perform discovery according to certain schedules. The effect of the rulings in this case would discourage such discovery agreements. Thus, the judgment of the lower courts should be reversed.

B. Summary Judgment Was Improper In The Absence Of Any Evidence As To What Was Or Was Not Foreseeable.

This case presents an excellent opportunity for this Court to clarify the requirements for providing a properly supported motion for summary judgment as required by Rule 56(c) of the Federal Rules of Civil Procedure. In so doing, this Court will have the opportunity to explain the differences between *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), and the recent case of *Celotex Corp. v. Catrett*, 477 U.S. . . . ., 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986).

Summary judgment was improper in this case because of the absence of discovery on the issue of foreseeability and the failure of the Government to provide a properly supported motion for summary judgment. There was no direct evidence conclusively stating what was or was not foreseeable or reasonably foreseeable; therefore, summary judgment should not have been granted. Unlike the *Celotex* case, this is not a case where there has been extensive discovery on the issue of foreseeability or a refusal by Prudential to produce evidence relating to foreseeability. Rather, by agreement of the parties, there has been no discovery on the issue of foreseeability. Therefore, this case is within the rule announced in *Adickes*. The Government did not present a motion for summary judgment which was properly supported; therefore, summary judgment should not have been granted.

At the time of the Government's motion for summary judgment, there was no evidence concerning what damages were foreseeable at any time, nor was there any evidence of what might reasonably have been foreseeable at any time. The only facts and evidence which might relate in any way to the issue of foreseeability were: (1) the types of damage claimed by Prudential, (2) the date of the original execution of the lease, (3) the date of the renewal of the lease, (4) the effective date of termination of the lease, (5) the date of notice to the Government of the existence of the substitute tenant, and (6) the date of evacuation by the Government. There was absolutely no evidence concerning what was foreseeable or what might reasonably have been foreseeable. Summary judgment in such a case is clearly improper. *See Eastern Tunneling Corp. v. Southgate Sanitation Dist.*, 487 F. Supp. 109, 116 (D. Col. 1980); *Systems Corp. v. American Telephone & Telegraph Co.*, 60 F.R.D. 692, 694 (S.D.N.Y. 1973). Although the Government failed to offer any conclusive evidence on the issue of foreseeability, *i.e.*, any evidence which might require counter evidence by Prudential, the lower courts granted summary judgment for the Government. This holding is in direct contrast with the requirements for summary judgment as announced by this Court and by other circuits. *Adickes, supra; McWhirter Distributing Co. v. Texaco, Inc.*, 668 F.2d 511 (Temp. Emer. Ct. App. 1981); *United States v. Standard Oil Co. of*

California, 618 F.2d 511 (9th Cir. 1980). Therefore, the judgment of the lower courts should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

By: _____

F. WALTER CONRAD, JR.
Counsel of Record

THOMAS H. ADOLPH
JOHN T. SIMMONS, JR.

Attorneys for The Prudential Insurance Company of America

November, 1986

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Appellant,
v.
THE UNITED STATES,
Appellee.

Appeal No. 86-523

DECIDED: August 29, 1986

Before RICH, *Circuit Judge,* NICHOLS, *Senior Circuit Judge,* and ARCHER, *Circuit Judge.*

ARCHER, *Circuit Judge.*

The Prudential Insurance Company of America (Prudential) appeals from the United States Claims Court's partial grant of summary judgment[1] for the government in *The Prudential Insurance Company of America* v. *United States,* 7 Cl. Ct. 710 (1985), holding that, as a matter of law, Prudential was not entitled to special or consequential contract damages incurred as a result of the government's holdover in its leasehold. We affirm.

BACKGROUND

A full and complete exposition of the uncontroverted facts may be found in the Claims Court opinion. Summarily, the government had entered into a fixed-term lease for office space in the Pinehollow Building in Houston, Texas. Shortly after the lease commenced, Prudential purchased the Pinehollow Building from the lessor, Diversified Building Equities, Inc. and retained Diversified to manage the building. The lease agreement afforded the

[1] The remaining issues were settled and judgment entered accordingly, see *infra* n.4.

government the option to extend the lease for a fixed period, which the government timely exercised. Either party then had the option to terminate the lease at any time during the extension period effective ninety days after giving notice.[2] Prudential exercised this option and the lease was terminated effective June 27, 1979. The government did not vacate its Pinehollow space on June 27, but instead held over as a tenant-at-sufferance until April 15, 1980.

Prudential, on several occasions[3] after June 27, 1979, demanded that the government vacate its Pinehollow space. Through these communications the government was placed on notice that: (1) Prudential was negotiating a new lease with one of its tenants; (2) this new lease would include the space occupied by the government; and (3) Prudential could suffer considerable damages if the government did not vacate the space. Prudential executed the new lease with its tenant, Cities Service Company, on November 30, 1979. It covered existing space occupied by Cities Service as well as additional space in the Pinehollow building, including the government-occupied space. The new lease agreement also gave Cities Service the option to cancel its entire lease if it could not occupy the space encumbered by the government by February 1, 1980. Cities Service, on March 2, 1980, terminated its entire lease with Prudential because the government-occupied space was not available to Cities Service by the required date of February 1, 1980.

Prudential brought suit against the government in the United States Claims Court for $814,723 in special or consequential damages.[4] This amount included sums for: (i) net loss of rental

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[2] Clause 13 of the lease provided:

> Either party may terminate this lease during renewal period by giving at least 90 days' notice in writing to the other party, and no rental shall accrue after the effective date of such termination.

[3] July 17, 1979; August 14, 1979; and November 6, 1979.

[4] The suit included a claim for the net fair rental value of the use of space in the Pinehollow building during the government's holdover of occupany under a taking theory. The court concluded that the government was liable but that the amount of the fair rental value was in

revenue from the Cities Service space; (ii) real estate commissions incurred in obtaining the new tenants; (iii) refurbishing expenses related to the new tenants; and (iv) increased operating expenses related to the new tenants. Prudential also sought recovery of $35,000 for attorney fees.

CLAIMS COURT OPINION

The Claims Court, mindful of its jurisdiction under 28 U.S.C. § 1491(a)(1) (1982),[5] determined that there was no express provision in the contract requiring the government to vacate at the end of the lease term and that an implied in fact contract had not been established by Prudential. The court then held as a matter of law that an implied covenant to vacate cannot be read into a fixed-term lease agreement where the government is the lessee. *Prudential Insurance*, 7 Cl. Ct. 714-15.

The court further held that even if a covenant to vacate the Pinehollow space could be imputed against the government under the lease agreement, the government would not be liable for the special or consequential damages claimed by Prudential. *Id.* at 717-18. In reaching this conclusion, it adopted the general rule of contract law that a tenant is only liable for special or consequential damages if they were foreseeable at the time the lease was executed. *Id.* at 716-18. Under the circumstances presented, the court concluded that it was not foreseeable at the time the government executed its lease that the lessor would be damaged, as a result of the government's holdover, by the loss of another Pinehollow lessee occupying leased space far in excess of that

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dispute, and thus not a proper matter for summary judgment. The amount of the fair rental value was thereafter stipulated and agreed upon by the parties and judgment was entered accordingly.

[5] Section § 1491(a)(1) states, in pertinent part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .

occupied by the government, or that the lessor would be damaged by having to subdivide the other lessee's space to accommodate a plurality of new tenants.

ISSUES

Prudential has appealed both rulings of the Claims Court and we are called upon to decide:

a. whether the Claims Court erred in holding that the government is not obligated under a fixed term lease to vacate the premises at the end of the term in the absence of an express or implied in fact covenant requiring it to do so; and

b. whether, assuming the government breached an obligation to vacate, the Claims Court erred in concluding that the government would not be liable for special or consequential damage sought by Prudential.

OPINION

A. Prudential contends in this appeal, as it did before the Claims Court, that a lease for a fixed term obligates the lessee to vacate at the end of that term. It says the obligation is implicit or inherent in the landlord-tenant relationship under such a lease. Thus, at the beginning the landlord is obligated to deliver possession of the premises to the lessee and, by the same token, at the end of the term the lessee is obligated to deliver up possession. This argument is based on construction of the express terms of the lease agreement, and not on additional or implied in fact agreements established through parol or other evidence.

The Claims Court, however, focused its opinion in large measure on the necessity of Prudential showing the existence of an implied in fact agreement separate and distinct from the lease agreement, in order to recover. It first noted that the Pinehollow lease contained no express covenant requiring the government to vacate at the end of the lease term; that the common law remedies for monetary compensation — trespass, assumpsit or unlawful detainer — available to a landlord against a holdover

tenant were actions sounding in tort and did not fall within the court's jurisdictional umbrella provided by the Tucker Act;[6] and that state law damage provisions for holdover were not applicable to the federal government. To establish an implied in fact covenant requiring the government to vacate at the end of the term, the Claims Court, relying on *Goodyear Co.* v. *U.S.*, 276 U.S. 287 (1928) and *H.F. Allen Orchards* v. *U.S.*, 749 F.2d 1571 (Fed. Cir. 1984), ruled that there must be the same mutuality of intent as in the case of an express covenant.

A contract implied in fact is not created or evidenced by explicit agreement of the parties, but is inferred as a matter of reason or justice from the acts or conduct of the parties. However, all of the elements of an express contract must be shown by the facts or circumstances surrounding the transaction — mutuality of intent, offer and acceptance, authority to contract — so that it is reasonable, or even necessary, for the court to assume that the parties intended to be bound.

The Claims Court found Prudential set forth "no facts either in the lease itself or in the circumstances surrounding its execution which would indicate such mutual intent here." Since an implied in fact covenant is not the theory of the case put forth by Prudential, it is not surprising that such facts are missing.

We are required to deal here only with the express terms of the Pinehollow lease and determine, as a matter of law, whether they may properly be construed to impose on the lessee an implicit obligation or covenant to return possession of the premises to the lessor at the end of the lease period, and whether a failure to do so constitutes a breach of the lease agreement. *Cf. United States* v. *Bostwick*, 94 U.S. 53, 66 (1876).

B. It is well settled that contracts to which the government is a party — and though a lease may concern and convey a property interest it is also very much a contract — are normally governed by federal law, not by the law of the state where they are made or performed. *United States* v. *County of Allegheny*, 322 U.S. 174,

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[6] 28 U.S.C. § 1491(a)(1).

183 (1944); *Forman* v. *United States,* 767 F.2d 875, 879 (Fed. Cir. 1985); *Keydata Corp.* v. *United States,* 205 Ct. Cl. 467, 482 (1974); *cf. George S. Groves* v. *United States,* 202 Ct. Cl. 660, 674 (1973). Leases are not sufficiently different from other federal contracts to call for an independent set of analytical principles and rules, *cf. Perry* v. *United States,* 294 U.S. 330 (1935); *Forman,* 767 F.2d at 879; *Torncello* v. *United States,* 681 F.2d 756 (Ct. Cl. 1982), particularly when there is no question about the nature of the property interest transferred, but merely a question of the lessee's obligations under the lease agreement. *Keydata Corp.,* 205 Ct. Cl. at 482. To the extent existing federal law is not determinative of the issue and permits an area of choice between the merits of competing principles, the best in modern decision and discussion, including the general principles of contract and landlord-tenant law, should be taken into account. *Friebe & Sons, Inc.* v. *United States,* 332 U.S. 407, 411 (1947); *National Metropolitan Bank* v. *United States,* 323 U.S. 454, 456 (1945); *Keydata Corp.,* 205 Ct. Cl. at 480.

A general rule of landlord-tenant law, as applied between private parties, is that the expiration or termination of a lease agreement terminates all rights of the lessee in the premises, and it becomes the lessee's duty to surrender possession of the leasehold to the lessor. 49 AM. JUR. 2D *Landlord and Tenant* § 1013 (1970); RESTATEMENT (SECOND) OF PROPERTY § 14.6, Reporter's Note to Section 14.6, Note 2 (1977) (in making a lease, the tenant has contracted, in effect, to surrender the premises upon the termination of the lease — by holding over the tenant has breached the lease). It is a covenant, either express or implied, of all leases for a definite term that the lessee will vacate the leasehold at the expiration or termination of the lease. *Catholic Bishop of Nesqually* v. *Gibbon,* 158 U.S. 155, 170 (1985); 49 AM. JUR. 2D § 1013.

One federal circuit court has recognized an implied obligation running against the government as a lessee to vacate its leasehold at the expiration of its lease. *Georgia Kaolin Co.* v. *United States,* 249 F.2d 148, 149 (5th Cir. 1957), *aff'g De Fore* v. *United States,* 145 F. Supp. 484, 490 (M.D. Ga. 1956). Another federal circuit

court has implicitly recognized the inherent obligation to vacate against a lessee, albeit between private parties, *Atlantic Richfield Co.* v. *Zarb*, 532 F.2d 1363, 1365 and n.1 (Temp. Emer. Ct. App. 1976). Numerous state courts have also noted this obligation. *See, e.g.*, 49 AM. JUR. 2D § 1013, 986 n.1 (cases cited therein); RESTATEMENT (SECOND) OF PROPERTY, Reporter's Notes to Section 14.6, Note 1 (cases cited therein).

The above-referenced authorities provide ample support for the conclusion that there is an implied contractual obligation running against a lessee to vacate a leasehold upon the expiration or termination of a lease.[7] Moreover, the proposition has logic behind it and is consistent with other principles of law. A lessor, under a fixed term lease, temporarily relinquishes to the lessee the limited, but exclusive, right to use the property for a predetermined period. The temporary nature of the transfer is founded upon the understanding of the parties that possession will be delivered up to the lessee at the commencement of the lease, and that upon expiration of the lease the lessee's limited rights in the property will terminate and the full rights in the property, including possession, will revert to the lessor. There is ample authority that there is an implied contractual obligation to provide the lessee with possession at the beginning of the lease term. *See* 96 A.L.R. 3d 1155; 49 AM. JUR. 2D §§ 216, 221; RESTATEMENT (SECOND) OF PROPERTY §§ 412, 512. Although the cases for the obverse are fewer, this may be attributable to the greater ease and efficacy in obtaining noncontractual relief as a result of holding over.[8]

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[7] Unlawful or unauthorized deprivation of property by a holdover tenant also constitutes tortious conduct. *See infra* note 8 and text following.

[8] RESTATEMENT (SECOND) OF PROPERTY, Reporters Notes to Section 14.6, Note 4, states:

> The other view is that holding over is a tort, damages for which need not be foreseeable by the holdover tenant, but only the proximate result of the holding over.

Compare *infra* Part C.

As a matter of contract interpretation, the decision of the Claims Court has the anomalous effect of voiding an express provision of the lease. By holding as a matter of law that an implied covenant to vacate cannot be read into a fixed term lease agreement, the ending date on which the lease expires or terminates is correlatively read out of the agreement and made meaningless. Such a construction defies logic and precedent for interpreting contracts. *Petrofsky d/b/a Petrof Trading Co.* v. *United States,* 616 F.2d 494 (Ct. Cl. 1980).

The Claims Court recognized in its opinion that a variety of common law writs are available to the landlord for ejecting, or securing damages from, a holdover tenant. All of these are based on tortious conduct — unlawful or unauthorized deprivation of property — a precondition of which is that the tenant has no contractual or other legal right to retain possession or occupancy of the leased premises beyond the lease term. These actions thus assume that an obligation to vacate at the expiration date of a lease is inherent, if not expressly stated, in the lease agreement.

Part of the reasoning of the Claims Court which influenced its decision was that if a covenant to vacate could be implied by the mere fact that the lease was granted for a limited term, an express covenant to vacate would be redundant or superfluous. Lease agreements today routinely spell out in great detail the lessee's obligations, including specific provisions relating to vacating the premises. Among other reasons for doing so, the landlord usually is seeking to obviate the need for judicial proceedings, to provide more specifically the lessee's duties in vacating, and to provide for liquidated damages for failing to vacate promptly. None of these renders an implied covenant nugatory; they supplement and enforce the implicit requirement of a fixed term lease to vacate on the termination date.

We conclude that, due to definite term of the lease and the nature of the landlord-tenant relationship, an implied duty to vacate is an inherent part of every fixed term lease agreement

unless the parties explicitly express an intention to the contrary.[9] General support for such a conclusion is found in the Supreme Court's opinion in *United States* v. *Bostwick*, 94 U.S. 53 (1876). The *Bostwick* Court stated that:

> in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not to unnecessarily injure it. . . . This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates.

Just as a requirement of proper use flows from the landlord-tenant relationship, a requirement to vacate flows from a lease containing a fixed term or a definite termination date.

Having determined that the Pinehollow lease agreement impliedly required the government to vacate at the end of the lease term (as extended by the renewal period),[10] it follows *ipso jure* that the government breached the lease agreement by holding over from June 27, 1979 to April 15, 1980.

C. In view of our conclusion that there was a contractual obligation to vacate, we must address the Claims Court's alternative basis for granting partial summary judgment. In doing so, we must determine whether there was a material issue of fact with respect to the foreseeability of the claimed special or consequential damages.[11] Prior to our review of this facet of the case,

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[9] Our review of the record does not reveal any express intention to exclude such an implied obligation from the Pinehollow lease agreement.

[10] A necessary consequence of this conclusion is that the Claims Court had jurisdiction based upon an express contract, the Pinehollow lease agreement. 28 U.S.C. § 1491(a)(1) (1982).

[11] Prudential has argued on appeal that the Claims Court did not apply the summary judgment standard enunciated by this court in *Lemelson* v. *TRW, Inc.*, 760 F.2d 1254 (Fed. Cir. 1985), because it engaged in fact-finding, made improper inferences, and resolved doubts in favor of the government.

however, we must resolve the question as to the appropriate point-of-time[12] against which foreseeability is measured.

Our predecessor court, the Court of Claims, has stated that foreseeability for consequential damages under government contract law is based upon what the parties contemplated as of the time the contract was made. *Northern Helex Co.* v. *United States,* 524 F.2d 707, 714-15 (Ct. Cl. 1975) (see cases cited therein at pp. 720-21). As between private parties, the Supreme Court has recognized that the party who breaches a contract can only be held responsible for such consequences as may be reasonably supposed to be within the contemplation of the parties at the time the contract was made. *Globe Refining Co.* v. *Landa Cotton Oil Co.,* 190 U.S. 540, 544 (1902). The general rule for consequential damages in property law is similarly that they must be foreseeable by the tenant/lessee at the time the lease is executed. RESTATEMENT (SECOND) OF PROPERTY § 14.6, Reporter's Note to Section 14.6, Note 4 (1977). The RESTATEMENT has, however, modified the general rule by making the holdover tenant liable for those damages which were foreseeable at the time the lease agreement was breached. *Id.* We conclude that the better rule, and the one that is applicable as federal law in interpreting a government contract, *County of Allegheny,* 322 U.S. at 183, is that, for damages to be recoverable as consequential or special, they must be foreseeable by the tenant at the time the lease agreement is executed.[13]

The determination as to whether the duty to vacate is an obligation which may be implied in a lease agreement is a question of law, and is reviewed as such. Likewise, the point-of-time from which foreseeability is measured, discussed *infra*, is a question of law.

[12] The Claims Court concluded that foreseeability of special or consequential damages is determined as of the time the contract was executed. Prudential argues on appeal that foreseeability should be measured at the time the lease agreement is breached.

[13] Although this may place a more difficult burden on a lessor seeking consequential damages against the government as a holdover tenant, lessors may have an alternate avenue of relief under the Takings Clause of the Fifth Amendment. *See Kimball Laundry Co.* v. *United States,* 338 U.S. 1 (1959); *United States* v. *General Motors Corp.,* 323 U.S. 363 (1945).

The Claims Court noted that, at the time the Pinehollow lease agreement was executed in 1973, it was not foreseeable by the government that, if and when it held over, it would cause the landlord to be damaged not only by the loss of a tenant for the leased property but also by the loss of a lease for other property in excess of that occupied by the government, and by having to subdivide that other property for new tenants. We cannot say that the court erred in holding that Prudential's claimed consequential damages were too remote and speculative, i.e., not natural and probable consequences flowing from the government's holdover. *Northern Helex Co.*, 524 F.2d at 720.

Prudential argues that resolution of the foreseeability issue was premature, that there was no direct evidence on the issue of foreseeability, and that the Claims Court improperly engaged in speculation and ignored evidence favoring Prudential's position. Prudential asserts that any delay in the availability of space can cause damage to a landlord in the form of a lost lease, lost profits, or liability to a new tenant for delay and that, in the context of modern commercial leasing practice, it is foreseeable that a holdover tenant may cause the landlord to lose an opportunity to lease a space which is smaller than, equal to, or larger than the leased space. We find these arguments singularly unpersuasive and insufficient to show the existence of a material issue of fact.

The uncontroverted evidence of record shows that Prudential exercised its option to terminate its lease with the government on March 27, 1979. And while the record does not indicate with precision the exact date on which Prudential started negotiations with Cities Service for a new lease, the most favorable inference is that they began immediately following Prudential's exercise of its termination option. With this timing, Prudential has failed to show that a material issue of fact existed concerning the government's ability to foresee Prudential's dealings with Cities Service or any other tenant occupying such a large part of the Pinehollow Building at the date of execution of its lease in 1973. Prudential has not pointed to any evidence of record to show that such factual concerns, relevant to a real or prospective client, were communicated to the government at that time. General state-

ments as to lost leases, lost profits, or liability to new tenants for delay in occupying a leasehold are merely conclusory and speculative in nature and are insufficient to withstand a motion for summary judgment. The party opposing summary judgment must show an evidentiary conflict on the record by a counter statement of facts or facts set forth in detail by a knowledgeable affiant. Mere denials or conclusory statements are insufficient. *Barmag Barmer Maschinenfabrik AG* v. *Murata Machinery, Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984).

While modern commercial leasing practices may have relevance in establishing the foreseeability of consequential damages, allusions to modern commercial leasing practices in the abstract are wholly insufficient to demonstrate a genuine issue of material fact. Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations and denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Prudential did not set forth any specific facts showing what its, or other companies', commercial leasing practices were, nor did it present any evidence to show that these practices were communicated, or known, to the agents of the government at the time the Pinehollow lease was executed. In the absence of any showing of a genuine issue of material fact, we are unable to say it was improper for the Claims Court to grant the government's motion for partial summary judgment.

As modified, we affirm the decision of the Claims Court.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Appellant,
v.
THE UNITED STATES,
Appellee.

Appeal No. 86-523

NICHOLS, *Senior Circuit Judge,* concurring.

I join in Judge Archer's able opinion, but desire to add a few words respecting my own problems with the resolution of this case which, by the authorities, we are constrained to arrive at. Were we writing on a clean slate, I would prefer to make Prudential whole for the losses it has suffered because the government, by holding over its leasehold term, prevented it from performing its contract with Cities Service.

The opinion properly relies on *Northern Helex Co.* v. *United States,* 524 F.2d 707 (Ct. Cl. 1975), *cert. denied,* 429 U.S. 866 (1976) in which I dissented at 726, and cases cited therein. Perhaps a realistic assessment of the situation is the Holmesian doctrine that a contracting party who breaches a contract not enforceable in equity, or under tort law, really enjoys an option to withhold performance on payment of some anticipated money equivalent of what is withheld. *Oliver Wendell Holmes, The Common Law* (Howe Ed. 1963) 236. Thus he cannot realistically be said to act illegally. The established doctrine in government contract law goes back to a case cited and quoted in *Northern Helex: Myerle* v. *United States,* 33 Ct. Cl. 1 (1897), an opinion by Davis, *J.,* one of the ablest of that Nineteenth Century court.

Myerle's decedent, Phineas Burgess, a New York shipbuilder, was induced by the Navy Department to establish a shipyard at Sausolito, California, in 1876 where he contracted to perform

work ostensibly in repair of a U.S. warship, the *Monadnock*, but really to build a new one of that name. The work progressed slowly until 1878, and was thereafter suspended for lack of funding until 1883 with the new *Monadnock* still on the stocks in Burgess' shipyard, blocking his acceptance of other work. The case is a compendium of about all the breaches of a shipbuilding contract it is possible for the Navy Department to commit: defective plans, defective government-furnished material, long delays in payment, etc., with the further complication that Congress took the view the contracts were illegal, a position the court rejected. The court had to, and did, override other vigorous resistance to awarding anything, but the actual award of $129,811.43 (without interest for 20 years' delay in payment), was grossly insufficient to place the contractor in as good a position as he would have enjoyed if the government had performed, because of a rule made perfectly clear:

> We hold that the plaintiff can only recover those items of damage which are the proximate result of the acts of the Government. What those items are is somewhat difficult to determine. For a damage to be direct there must appear no intervening incident (not caused by the defaulting party) to complicate or confuse the certainty of the result between the cause and the damage; the cause must produce the effect inevitably and naturally, not possibly nor even probably. The damage must be such as was to have been foreseen by the parties, who are assumed to have considered the situation, the contract, and the usual course of events; but eliminated from this consideration must be any condition of affairs peculiar to the contractor individually in the particular case and not of general application under similar conditions. There must not be two steps between cause and damage. We have followed this rule in the decision as to the different items of claim shown in the Conclusion of Law.

Myerle v. *United States,* 33 Ct. Cl. at 27.

Thus, interference with other business resulting from the breach was excluded from the damages. The inadequacy of "foreseeability" alone to distinguish allowable from unallowable items of cost or loss, is plain. Even though antecedently consid-

ered, injury to the other party is not only "possible," but even "probable;" in case of a breach, it may not be allowable. Judge Davis' formulation is, I believe, about what we apply today and, on applying it to our present case, the result we reach is unavoidable. I doubt if any showing in Prudential's power to make could have sufficed to obtain a different result. My dissent in *Northern Helex* was naive in treating the ostensible test of "foreseeability" as the real one.

The inadequacy of damages in case of government contract breach has become anomalous in contrast to the generosity with which damages are today awarded in other contexts. While damages are supposed or imagined to provide a disincentive to violating the legal rights of others, the government here may even enjoy incentives to commit such violation in some circumstances, when equitable relief and tort liability are both unavailable. I am not advocating judicial lawmaking, however. The matter would appear to call for congressional attention as it involves the waiver of sovereign immunity.

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

No. 141-82L
(Filed April 9, 1985)

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

v.

THE UNITED STATES

Lease; Lessor's claim for special damages against lessee-government holding over after termination of lease not based on lease agreement in absence of a clause requiring government to vacate; Claim for damages must be based on contract and not under tort or implied-in-law contracts; Measure of just compensation for temporary taking.

F. Walter Conrad, Houston, Texas, attorney of record for plaintiff. *Baker & Botts* and *John T. Simmons, Jr.,* of counsel.

Silvia Sepulveda-Hambor, Washington, D.C., with whom was *Acting Assistant Attorney General F. Henry Habicht II,* for defendant. *Howard L. Hardegree,* of counsel.

OPINION
ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SPECIAL DAMAGES CLAIM, OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT

MILLER, *Judge*:

The government failed to vacate leased premises until 10 months after receiving the lessor's notice of termination of the lease. The government concedes liability for the fair rental value of the space it occupied for the 10-month period. The questions presented are:

> (1) Was the government's holding over also a breach of its lease agreement which rendered it liable for special contract damages?
>
> (2) If the answer to (1) is in the negative, may the plaintiff be entitled to reimbursement for the same items of claimed special damages as part of just compensation for a temporary taking?

STATEMENT

Since defendant's motion is addressed to the sufficiency of plaintiff's claims for special damages, the facts referred to herein are derived from the complaint as supplemented by the undisputed underlying documents submitted by the parties in connection with the motion.

On December 28, 1973, the General Services Administration (GSA), leased from Diversified Building Equities, Inc. (Diversified) approximately 8,197 net usable square feet of space in the Pinehollow Office Building in Houston, Texas, to be occupied by the Internal Revenue Service (IRS). The initial term of the lease was from March 1, 1974 through February 28, 1979. By subsequent amendments, the rented area was increased to approximately 14,074 square feet.

On July 1, 1974, plaintiff, Prudential, purchased the Pinehollow building and retained Diversified to manage the building.

Clause 5 of the lease agreement gave the government the option to extend the lease term for a period of 3 years. The government exercised this option on January 5, 1979, requesting a renewal through March 7, 1980. However, clause 13 provided that either party could terminate the lease during the renewal period by giving 90 days' notice in writing to the other party. Pursuant to this clause, on March 27, 1979, plaintiff gave notice of termination, with the effective date to be June 27, 1979.

Upon inquiry from the defendant, plaintiff offered to continue the lease on a tenant-at-sufferance basis for a monthly rental of $15,486 (twice the previous rate specified in the lease), but defendant did not accept the offer. As the result, on July 17, 1979, plaintiff sent GSA a letter demanding that IRS vacate the leased premises immediately. Nevertheless, IRS continued to occupy the premises until April 15, 1980.

During the period that the government's lease was in effect, Prudential also had another tenant in the same building, Cities Service Company, which occupied 48,274 square feet of space. On November 30, 1979, Prudential and Cities Service entered into a new lease, from November 1, 1979 through June 30, 1986, for 79,533 square feet, which included the space then occupied without a lease by IRS. That lease included a clause allowing Cities Service to terminate if the additional space occupied by the IRS in the Pinehollow Building was not released on or before February 1, 1980.

In its letter of July 17, 1979, plaintiff made defendant aware that it was negotiating a lease for a major portion of the Pinehollow Building to another (unnamed) tenant in the same building, contingent upon the IRS vacating its quarters by October 1, 1979. On August 14 and November 6, 1979, plaintiff made further demands upon defendant to vacate, each time notifying the government that Prudential would suffer considerable damages if the IRS did not vacate the Pinehollow Building immediately.

On March 1, 1980, Cities Service exercised its option to terminate for the stated reason that plaintiff was unable to deliver the second floor space still occupied by the government. It vacated the remainder of its space in the Pinehollow building on July 31, 1980.

Plaintiff asserts that as a result of the holding over defendant owes Prudential the sum of $195,125 in rent for the 14,074 square feet occupied by IRS, less $78,205 in partial payments thereon, leaving a net amount due of $116,920. The government does not dispute that it owes rent at fair market value for the holdover period, but does dispute the plaintiff's claim as to the amount thereof.

In addition, plaintiff claims special damages of $814,723, plus $35,000 in attorneys' fees, consisting of the following:

Item	Damages
(1) Loss of rental revenue from a single tenant for the 79,533 square feet, which were to be occupied by Cities Services, less the rent received from seven new smaller tenants for the space.	$327,329
(2) Increase in real estate commissions which plaintiff incurred to obtain the seven new tenants for the 79,533 square feet.	115,847
(3) Increase in refurbishment expenses required for the seven new tenants in excess of which Prudential had agreed to incur for Cities Service alone for the same space.	131,114
(4) Increase in base operating costs for the seven new tenants over that required under the Cities Service lease for its 5-year term	240,432
Total	$814,723

Defendant contends in its motion that the claim for special damages must be dismissed because it does not come within the statutory authority of this court, which, insofar as pertinent, is limited to "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United

States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1)(1982). Conversely, plaintiff maintains that the court does have jurisdiction of the claim for special damages, because it arises out of a contract, the lease agreement which preceded the holdover.

DECISION

I.

Contract Damages

A. Examination of the pertinent clauses of the lease agreement shows that the lessor leased to the government the described premises "TO HAVE AND TO HOLD the said premises with their appurtenances for the term beginning on March 1, 1974, through February 28, 1979, subject to termination and renewal rights as may be hereinafter set forth." (Par. 2.) "This lease may be renewed at the option of the Government, for the following terms and at the following rentals." (Par. 5.) And "[e]ither party may terminate this lease during the renewal period by giving at least 90 days' notice in writing to the other party, and no rental shall accrue after the effective date of said termination." (Par. 13.) There is no provision obligating the government to vacate the premises at the termination of the lease.

At common law a bare lease is merely a conveyance of the lessor's interest in property for a limited term. After the expiration of such term, if the former lessee holds over, the owner's remedy is eviction, or, if he desires monetary compensation, a suit for damages for trespass, assumpsit or unlawful detainer. *See Cohen* v. *Foodtown Inc.*, 207 A.2d 122, 124 (D.C. 1965); *Leonard* v. *Autocar Sales & Service Co.*, 325 Ill. App. 375, 60 N.E. 2d 157, 462 (1945), *cert. denied*, 327 U.S. 804 (1946); *Clark* v. *Harry*, 182 Va. 410, 29 S.E. 2d 231, 233 (1944); *Bahcall* v. *Gloss*, 244 Wis. 473, 12 N.W.2d 674 (1944); *Jensen* v. *Nolte*, 233 Iowa 636, 10 N.W.2d 47 (1943); *Dan Cohen Realty Co.* v. *National Savings & Trust Co.*, 125 F.2d 288 (6th Cir. 1942); *Becker* v. *Manufacturers Trust Co.*, 262 App.Div. 525, 30 N.Y.S.2d 542 (1941); *State ex rel. St. Louis County* v. *Evans*, 346 Mo. 209, 139

S.W. 2d 967, 969 (1940) (en banc); *Holcombe* v. *Lorino*, 124 Tex. 446, 79 S.W. 2d 307, 310 (1935). And, *see generally* 3 R. Thompson, *Thompson on Real Property*, § 1046 at 168 (6th ed. 1980); 2 R. Powell, *The Law of Real Property*, § 221 at 179 (1977); 6 S. Williston, *Williston on Contracts*, § 890 at 587 (3rd ed. 1962); 1 *American Law of Property*, § 3.11 at 203 (A.J. Casner ed. 1952). In addition, some state statutes entitle the lessor to specific kinds of damages against a tenant who holds over, such as double the prior rent or a renewal of the lease.[1]

However, this court has no jurisdiction of a suit brought against the United States on any such theory. For plaintiff to prevail it must bring itself under the jurisdictional umbrella of a claim founded upon an express or implied in fact contract. 28 U.S.C. § 1491(a)(1).

As already noted defendant's lease contained no express covenant obligating defendant to vacate the premises after its expiration. Nor could it be implied merely by the provision that the lease was for a limited term. *Goodyear Co.* v. *United States*, 276 U.S. 287 (1928). In *Goodyear* the United States had occupied leased premises for 6 months beyond the termination date of its lease, and offered to pay the lessor the fair rental value of its occupancy. However, the lessor sued in the Court of Claims for a full year's rental, the measure of damages allowable for a holdover under the Ohio common law. The Supreme Court affirmed the Court of Claims' dismissal of the suit (62 Ct. Cl. 370 (1926)), for lack of jurisdiction, on the grounds that the United States had never agreed to be bound for more than the period of its actual occupancy. The court stated (*Goodyear*, 276 U.S. at 293):

> It is immaterial that under the common law in Ohio as applied between private parties, a lessee holding over after the expiration of his lease is held, at the option of the lessor, to be bound for another year, under an agreement implied in law, regardless of his actual intention, * * *. Not having

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[1] *See* D.C. Code Ann. § 45-1407 (1981) (double rent); Md. [Real Property] Code Ann. § 8-402 (1981) (tenant liable for damages caused by holdover); Va. Code § 55-223 (1950) (tenant liable for any loss or damages sustained by lessor).

> affirmatively continued the lease beyond the actual period of occupancy, the Government cannot, * * * be bound for a longer term.
>
> Furthermore, independently of that doctrine, the right here invoked to sue the United States under the Tucker Act on a claim founded on contract — as this is — must rest upon the existence of a contract express or implied in fact, no right of action being given by the Act in cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law.

Plaintiff urges that a covenant by the United States to vacate after the termination of the lease or pay contract damages may be implied here. But for such a covenant to be implied in fact there must exist the same mutuality of intent as in the case of an express covenant. *Id.* And *see also H.F. Allen Orchards* v. *United States,* 4 Cl. Ct. 601, 605-06, *aff'd,* 749 F.2d 1571, 1575 (Fed. Cir. 1984). Plaintiff sets forth no facts either in the lease itself or in the circumstances surrounding its execution which would indicate such mutual intent here. In fact the undisputed circumstances are to the contrary.

If the lessor desired additional protection, it could have insisted on inclusion in the lease contract of a covenant by the lessee to vacate the premised after termination of the lease, on pain of contract damages, liquidated or unliquidated, for its breach. Such clauses are commonplace in commercial leases. *See* 1 S. Williston, *Williston On Contracts: Forms,* §§ 890A, 946 (3d ed. 1979); 11A G. Thompson, *Thompson On Real Property: Forms,* §§ 869, 959 (4th ed. 1965); E. Belsheim, *Modern Legal Forms,* §§ 5085, 5085.1, 5085.2, 5086 (1962). Given the fact (as plaintiff alleges) that Prudential "is an established business involved in leasing properties on a nationwide basis," plaintiff may properly be presumed to have been aware of such clauses and their purpose. Indeed, in its lease agreement with Cities Services, plaintiff inserted just such a covenant.[2] In this instance, however, the

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[2] SEC. 24. HOLDING OVER: In the event of holding over by Lessee after the expiration or termination of this lease, such hold over

lease was on a standard GSA form, prepared by the lessee; and it is, therefore, not surprising that the lessee failed to insert such a covenant.

If it wished to preserve for itself the opportunity to obtain contract damages should the United States hold over, it was up to plaintiff to insist on a covenant requiring the lessee to vacate after termination of the lease. Conceivably, had it done so, the government might have withdrawn as a prospective tenant, as, absent such a clause, the United States always has the right to occupy premises for public purposes merely in return for fair rental value or just compensation. Furthermore, had the United States subscribed to such a covenant, it might well have decided against holding over, in favor of obtaining other leased premises at lesser cost. We may speculate as to the reason for the omission, and as to the lessee's conduct had there been such a clause, but we are not free to supply what the parties omitted from their agreement.

If a covenant to vacate could be implied by the mere fact that a lease has a limited term, an express covenant to vacate would be superfluous or redundant in any lease, including plaintiff's own agreement with Cities Service.

The question of the government's liability for damages resulting from its holding over after the termination of a tenancy has also been addressed by the Court of Claims in a number of cases. When it has held over after the termination of a lease, the United States has been held liable for the fair value of its use and occupancy of a landlord's property, on the theory either that there was an implied contract to pay such fair value or there was a

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shall be as a tenant at will and all of the terms and provisions of this lease shall be applicable during such period, except that Lessee shall pay Lessor as rental for the period of such hold over an amount equal to twice the rent which would have been payable by Lessee had such hold over period been a part of the original term of this lease, and Lessee will vacate said premises and deliver the same to Lessor upon Lessee's receipt of notice from Lessor to vacate said premises. The rental payable during such hold over period shall be payable to Lessor on demand. No holding over by Lessee, whether with or without consent of Lessor, shall operate to extend this lease except as herein provided.

temporary taking of the property with liability for just compensation under the Fifth Amendment. *Consumers Ice Co.* v. *United States,* 201 Ct. Cl. 116, 128, 475 F.2d 1161, 1168 (1973); *Barcroft Lake Shores, Inc.* v. *United States,* 135 Ct. Cl. 623, 626 (1956); *Garrity* v. *United States,* 107 Ct. Cl. 92, 105, 67 F. Supp. 821, 826 (1946); *Semmes & Barbour* v. *United States,* 26 Ct. Cl. 119, 130 (1891); and *Kugler* v. *United States,* 4 Ct. Cl. 407, 414-15 (1868). None of these cases suggests that, in the absence of a clause requiring the government to vacate at the end of the lease term, the government's liability for damages may be founded on the expired lease agreement.

Particularly in the case where the government is the lessee, the court is reluctant to impute to the parties merely from the leasing for a limited term the intent that the lessee pay contract damages in the event it does not vacate promptly when the lease expires. Since it is clear that the United States may occupy the premises in return for payment of its fair rental value on the theory of a temporary taking, it is not reasonable to conclude, without specific evidence to support it, that the United States has agreed to pay more than could be required of it in the exercise of its sovereign right.

Contrary to plaintiff's contentions, a holding that the lease did not require that the government vacate the leased premises after termination does not render meaningless the clause giving plaintiff the option to terminate after renewal. In the event the fair rental value of the space increased or decreased over the lease term, it permitted the party adversely affected by the existing lease to obtain an adjustment. If the government as lessee was unwilling to execute a new lease with increased rent, it would either have to vacate or pay the fair rental value in any event.

B. In furtherance of its argument that the holdover by the government is a breach of the lease contract, plaintiff cites *Irving Trust Co.* v. *American Silk Mills, Inc.,* 72 F.2d 288 (2d Cir.), *cert. denied,* 293 U.S. 624 (1934); *United States* v. *Morgan,* 196 F. Supp. 345 (D.Md. 1961), *aff'd,* 298 F.2d 255 (4th Cir. 1962) and 51C C.J.S., *Landlord and Tenant,* § 316(c) at 801-02 (1968). But none of these authorities supports the view that a

lease for a term of years must be construed as containing a promise by the lessee to vacate at the conclusion of the term.

Irving Trust Co. was a suit for damages expressly provided for by the lease. After the tenant defaulted by nonpayment of rent for 2 months, the lessor gave the tenant notices of termination and to vacate due to the default, but the tenant failed to heed the notice and stayed on for 4 months more without payment of rent. When the lessor sued for the unpaid rent during the period of occupancy plus damages attributable to the lessor's inability to rent the premises for 3 months thereafter during the original lease term, the court held that the provisions of the lease entitling the landlord, after default, to repossess the property summarily and to relet it as agent for the tenant, and requiring the tenant to pay to the landlord all of the landlord's expenses in connection with re-entering, repossessing and reletting the property during the residue of the original term, were sufficiently explicit so as to entitle plaintiff to recover such damages from the tenant. Furthermore, nothing in *Irving Trust Co.* even remotely suggests that the landlord could have recovered damages attributable to another tenant having terminated his lease on different premises because of inability to obtain the premises in question.

Morgan, a case in which the United States was the plaintiff-lessor, is also distinguishable in several respects. First, the lessees, expressly warranted that upon termination the they would cause the building to be completely vacated. Second, the claim by the United States was only for rent for the period of actual occupancy beyond the termination date. Third, the court expressly stated that the liability it found was not under the expired lease, but either for unlawful use or occupancy of property belonging to the lessor or for a tort.

Nor does the citation to *Corpus Juris Secundum* support plaintiff's theory herein. Although the treatise states that in general a lessor has a claim for damages for the lessee's delay in surrendering possession after termination of the lease, it does not state that the damages are for breach of the expired lease contract. Examination of the cases cited in support of the statement in *Corpus Juris* likewise fails to show that they are based on

the breach of the original expired lease contract rather than on common law trespass, assumpsit, tort, or other theory involving the unauthorized or unlawful deprivation of property to which the landlord was entitled after the termination of the lease. None of such theories can be applicable in this suit, because the United States has not consented to suit in the Claims Court for claims based on tort, trespass, assumpsit, or similar theories.

C. The American Law Institute's *Restatement of the Law Property 2d,* Landlord and Tenant § 14.6 (1977), does allow special damages to a landlord from a holdover tenant. It states:

> § 14.6 Liability of Holdover Tenant for Special Damages
>
> Except to the extent the parties to a lease validly agree otherwise, if no election is made under the rule of § 14.4, the landlord, or incoming tenant, is entitled to recover from a tenant improperly holding over after the termination of his lease for the special damages caused by the holdover which the tenant could reasonably have foreseen at the time of his holding over would result from his conduct, and which the injured party could not reasonably have avoided, unless equitable considerations justify relieving the tenant of some or all of these damages.

In justification for this position, the reporter's note to § 14.6 states:

> 2. Justification for the present rule — In making a lease, the tenant has contracted, in effect, to surrender the premises upon the termination of the lease. In holding over, the tenant has breached his contract; hence courts are inclined to give the standard measure of damages for breach of contract.
>
> * * * *
>
> 4. The requirement of foreseeability — The general rule is that the damages be foreseeable by the tenant at the time the lease is made. See, e.g., Taylor v. Kaufhold, 368 Pa. 538, 84 A.2d 347, 32 A.L.R.2d 575 (1951). The other view is that holding over is a tort, damages for which need not be foreseeable by the holdover tenant, but only the proximate result of the holding over. See, e.g., Nodine v. State, 192 Misc. 572, 79 N.Y.S.2d 834 (Ct. Cl. 1948).

> The Restatement modifies the general rule by making the holdover tenant liable for those damages which were foreseeable at the time of his breach of contract, i.e., when he holds over, as opposed to the time of the making of the lease. There is limited support for this position; see § 10.2 on damages and the Reporter's Note thereto.

However, the position taken by the *Restatement of Property* is not persuasive herein.

First, the authorities which the reporter's note cites do not support the Restatement's position that in entering into a lease for a limited period the tenant has agreed as a matter of contractual obligation to vacate the premises at the termination of the lease term. The authorities cited in support of paragraph 2 of the reporter's note are: *McCullagh* v. *Goodyear Tire & Rubber Co.*, 342 Mich. 244, 69 N.W.2d 731 (1955); *Taylor* v. *Kaufhold*, 368 Pa. 538, 84 A.2d 347, 32 A.L.R. 2d 575 (1951); 1 *American Law of Property* § 3.36 (A.J. Casner ed. 1952). And *see generally* 32 A.L.R. 2d 582 Annot. (1953). However, *McCullagh* allowed special damages not for a breach of contract but under a Michigan statute entitling the landlord to special damages in an action for trespass against a holdover tenant. *Taylor* involved an express covenant in the lease to deliver up the premises to the lessor in good order and repair at the end of the term, and the court thought that it did not make any difference in the result whether the recovery of special damages was attributable to breach of contract or trespass.

Casner's *American Law of Property* states that at common law the lessor's remedy was either an action in trespass or assumpsit. While it also states that special damages ought to be recoverable, it finds it unnecessary to decide "whether the theory of the action is tort or contract." The authorities Casner cites likewise do not base the recovery of special damages on a contract theory, where there is no express agreement to vacate at the end of the lease term.

Examination of the cases in the annotation at 32 A.L.R.2d 582 similarly do not support the thesis that the mere agreement by the lessee to lease for a limited term involves an intent in fact to warrant that he will vacate at the end of the term. The cases cited in the annotation are all distinguishable because they are based upon theories of trespass, assumpsit, taking of property unlawfully, statutory remedies, or express agreements to vacate.

Second, the reporter's note at paragraph 4 concedes that § 14.6 is based upon a tort damage theory rather than contract, insofar as the special damages need not be foreseeable by the tenant at the time the lease is made but only need be the proximate result of the holding over.

Third, insofar as § 14.6 allows "equitable considerations" to relieve the tenant from the special damages, it is also apparent that the rule is not based on contractual intent. The illustrations in the reporter's notes indicate that if the tenant's holding over is not willful, such as where the tenant has suffered a heart attack or is otherwise ill, this may excuse him from liability for special damages; but under ordinary contract law this would depend upon the intent of the parties at the time they entered into the contract rather than on equitable considerations. *Northern Helix Co.* v. *United States,* 207 Ct. Cl. 862, 877-78, 524 F.2d 707, 720 (1975), *cert. denied,* 429 U.S. 866 (1976), *citing, Globe Refining Co.* v. *Landa Cotton Oil Co.,* 190 U.S. 540, 544 (1903).

Thus, although the Restatement's rule purports to be one of contract, it imposes obligations as a matter of law which do not necessarily result from the express or implied agreement or intent of the parties.[3] It is well settled that this court does not have

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[3] See *Herter* v. *Mullen,* 159 N.Y. 28, 43-44, 53 N.E. 700, 705 (1899):

> It is also well-settled that, where a duty or charge is created by law, and the performance is prevented by inevitable accident or the act of God, without fault of the party sought to be charged, he will be excused, but where a person absolutely, and by express contract, binds himself to do a particular thing, which is not at the time impossible or unlawful, he will not be excused, unless through the fault of the other party. The reason given for the latter portion of this rule is that he might have provided by his contract against inevitable accident or the

jurisdiction to award judgment upon a claim based on a contract implied in law. *Goodyear Co.* v. *United States,* 276 U.S. 287, 293 (1928); *Merritt* v. *United States,* 267 U.S. 338, 341 (1925).

C. Finally, even if in the agreement to lease for a limited term of years there could be imputed to the United States the intent to agree to vacate the premises upon termination, it is difficult to comprehend how the damages which plaintiff seeks could be foreseeable at the time the United States entered into the lease. The lease was executed in 1973 between Prudential's predecessor, Diversified, and the United States, before Prudential acquired the property. Certainly at that time it was not foreseeable by the tenant that, if and when it held over after notice of termination, it could cause the landlord to be damaged not only by the loss of a tenant for the leased property but also by the loss of a lease for other property of a size far in excess of that occupied by the United States, and that the landlord would also be damaged by having to subdivide the other property for a multiplicity of tenants. Indeed, Prudential did not even enter into the lease with Cities Service for the combined premises, which Cities Service terminated, until 4 to 5 months after termination of the government's lease. *See Northern Helix,* 207 Ct. Cl. at 877-88, 524 F.2d at 720.

D. To the extent that plaintiff must rely upon the implied contract arising from the fact of the holdover occupancy itself, it is not entitled to the kind of damages the plaintiff seeks here, because the implied contract is only to pay the fair value of the use and occupancy, not damages arising out of the loss of another

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act of God. (citations omitted) Thus the most that can be said of the obligation that arises from the relation of landlord and tenant and follows by a general lease is that the tenant is charged with the duty of vacating the premises at the end of his term. If he fails, it is a breach of his duty, and ordinarily the law implies or creates a liability on his part for another year's rent. This being a duty implied or created by law, and not an express or absolute agreement, it falls within the first part of the foregoing rule, and hence it is obvious that, if the tenants removal was rendered impossible by inevitable accident or the Act of God, he is excused for his omission to surrender the premises, at least so far as it creates a liability for a year's rent which is implied by law.

tenant for different space nor the loss of potential profits from a different lease agreement with another tenant.

II

Just Compensation

Although defendant concedes that plaintiff is entitled to just compensation under the Fifth Amendment for a taking by the United States, in its briefs defendant fails to argue in support of its assumption that the special damages asserted by plaintiff may not be reflected in the determination of such just compensation.

In *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 281 (1943), the Supreme Court reminded us that "it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken." *Id.* at 281. And in determining that compensation, it stated, the fair market value to which the owner is entitled "may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract" *(id.* at 275); although it also cautioned that "in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future" lest "the chance of their being united for that special use [be] regarded 'as too remote and speculative to have any legitimate effect upon the valuation.' " *Id.* at 275-76.

In *Powelson* the Court held that the value of an electric power company's land at the time of its condemnation by the federal government could not be enhanced because of the possibility that it could have but did not in fact exercise a power of eminent domain of is own, delegated to it by the state, to enable it to add to that tract other land and construct a large hydroelectric power project. *Id.* at 284. The Court found that possibility too speculative to add to the value of the condemned land or to be property in itself. *Id.* at 285. Whether or not the additional value which plaintiff claims here is too speculative to be regarded as property

or to enhance the value of the property taken will have to be determined at trial.

In *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945), the Supreme Court considered, as a question of first impression, the measure of just compensation owed to a lessee of a warehouse under a long term lease, for the government's condemnation of the occupancy of such warehouse space for a one-year period. The government offered to pay only for the value of its short term occupancy carved out of the long term lease of an empty warehouse, while General Motors contended for reimbursement also of its actual expense of removing its automotive parts, bins, fixtures and equipment stored in the building. The Court disagreed with both positions. It held that, when the government takes less than the entire interest of a citizen and leaves him holding the remainder, payment of merely market rental value is not the just compensation which the Fifth Amendment contemplates, but rather (*id.* at 382) —

> The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what could be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier.

It stated that some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such a transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant, including labor, materials and transportation, as well as the storage of goods against their sale or the cost of their return to the warehouse at the conclusion of the temporary taking of the building. *Id.* at 383. It then explained (*id.*):

> Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual — the market — price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease. The respondent offered detailed proof of amounts actually and necessarily paid for these

> purposes. We think that the proof should have been received for the purpose and with the limitation indicated. Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning. [Citations in footnote omitted.]

In *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), the Supreme Court again held that the just compensation required for a temporary taking of property for a limited period is not necessarily confined to the value of the occupancy of the physical assets for the limited period, but may include as well the loss of related intangible values suffered by the owner which could have been anticipated at the time of taking and would have been taken into account in fixing a rental value. This was a factual matter which required a trial.

The issue here as to the value to be paid for the government's taking is both factual and difficult. If we take the approach of *General Motors* and *Kimball Laundry*, that value is to be determined at the time of the taking and the measure is what would have been arrived at in an arms length rental, we encounter the dilemma (on the present record at least) that the taking was not for a definite term. Was there a taking initially for a 10-month period, or was there a taking each month or each day when the government chose to continue to occupy the premises? If the former, how could the plaintiff have lost the value of the Cities Service lease when it was not entered into until 5 months after the government began its holding over? If the latter, when did the loss occur? Was the Cities Service lease at fair market value for similar space? If so, how can Cities Service's exercise of its option to terminate constitute a loss to plaintiff when the property still retained its value? These and other questions will have to be resolved on all of the facts at trial.

Conclusion

For the foregoing reasons, it is concluded that plaintiff is not entitled to the special damages which it claims on the theory of a breach of contract, and that the government's motion to dismiss or for partial summary judgment with respect to such claim must be allowed. However, the United States is still liable for the fair value of its use and occupancy of the premises which it held over. As there is a dispute between the parties as to such fair value, that issue remains for trial.

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Philip R. Miller
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Appellant,
v.
THE UNITED STATES,
Appellee.

Appeal No. 86-523

JUDGMENT

ON APPEAL from the United States Claims Court

in CASE NO(S). 141-82 L

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

DATED August 29, 1986

FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: October 27, 1986

COSTS AGAINST THE APPELLANT:
Printing $29.65
TOTAL $29.65

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Appellant,
v.
THE UNITED STATES,
Appellee.
} Appeal No. 86-523

Before RICH, *Circuit Judge,* NICHOLS, *Senior Circuit Judge,* and ARCHER, *Circuit Judge.*

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

9/26/86
Date

cc: Mr. F. Walter Conrad
Mr. John T. Stahr, DOJ

APPENDIX E

IN THE UNITED STATES CLAIMS COURT

No. 141-82 L

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

v.

THE UNITED STATES

JUDGMENT

FILED
SEPTEMBER 3, 1985

Pursuant to the opinion dated April 9, 1985, and the offer of judgment and notice of acceptance filed August 30, 1985,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rules 58 and 68, that plaintiff recover of and from the United States the sum of $136,000 for its claim for fair rental market value, together with costs and that its claim for special damages on the theory of a breach of contract is dismissed.

Frank T. Peartree
Clerk of Court

By: LINDA A. EDDIN
Deputy Clerk

September 3, 1985

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)